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Cover Page Footnote

Professor of Law, Boalt Hall School of Law, U.C. Berkeley. Many thanks to Jennifer Gordon and Sheila Foster for inviting me to participate in the New Dimensions of Citizenship Symposium at Fordham Law School. My profound thanks as well to Muneer Ahmad, Hamsa Murthy, Richard Perry, and Sabrina Safrin for their comments on this text, and to Harini Raghupathi for her research assistance. This essay is dedicated to the memory of Chris Iijima.

CITIZENSHIP UNDONE

*Leti Volpp**

In August 2006, it was revealed in the press that the United States had, since April of that year, been refusing to admit two of its citizens back into the country.¹ The two citizens were father and son: Muhammad Ismail, a forty-five-year-old naturalized citizen who had been born in Pakistan,² and Jaber Ismail, his eighteen-year-old son who had birthright citizenship in the United States.³ Neither father nor son was charged with any crime.⁴ But the Ismails were uncle and cousin to Hamid Hayat, a twenty-three-year-old U.S. citizen who had worked as a cherry packer in Lodi, California, and who had been convicted of providing material support to terrorists through his alleged attendance at a “Pakistani training camp.”⁵ After having lived in Pakistan for the previous four years, the Ismails had attempted to return to the United States in April 2006 for their relative’s trial, only to be told that they had been placed on a no-fly list because they had listed the “wrong person” as their emergency contact in their passports five years earlier—namely, their relative Hamid Hayat.⁶ Interviewed by FBI agents in Islamabad, they were informed that they could return to the United States only after completing a lie detector test.⁷ After refusing to submit to further questioning without a lawyer present, they were, in the words of one blogger, “banished from their own country.”⁸

The case of the Ismails raises many questions about the nature and meaning of citizenship. Does the fact that the Ismails were precluded from entering the country of their citizenship *nullify* their citizenship? U.S. law

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1. Demian Bulwa, *2 Lodi Residents Refused Entry Back Into U.S.*, S.F. Chron., Aug. 26, 2006, at A1; see also Randal C. Archibold, *U.S. Blocks Men’s Return to California from Pakistan*, N.Y. Times, Aug. 29, 2006, at A17.

2. Bulwa, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. See *Pakistani-American Teen, Father Barred from U.S.*, Garavi Gujarat, Aug. 31, 2006, http://www.gg2.net/viewnews.asp?nid=1944&tid=top_stories&catid=Top%20Stories.

7. *Id.*

8. See *Banished U.S. Citizens Mysteriously Permitted to Return Home (Maybe)*, Unclaimed Territory, <http://glenngreenwald.blogspot.com/2006/09/banished-us-citizens-mysteriously.html> (Sept. 13, 2006, 08: 43 EST).

is silent as to the internationally guaranteed right of return, or a person's right to return to his own country.⁹ The right to be present in one's own country would appear a precondition to all other civil, political, and social rights of citizenship. We might presume that this foundational, enabling aspect of citizenship remains unstated in U.S. law because it constitutes an unquestioned *sine qua non* to the rights of citizenship.¹⁰

Or can one, in fact, engage in citizenship without being physically present in one's country? Were the Ismails performing a kind of deterritorialized U.S. citizenship? Arguably, even while located in Pakistan, they engaged in that most civic and American of activities, namely, contacting the American Civil Liberties Union (ACLU) to help them with their case.¹¹

Or were the Ismails being punished for their failure to perform U.S. citizenship? The state wanted the Ismails to perform citizenship in the sense of proving their allegiance. I am reminded here of the historian Lucy Salyer's recent work on denaturalization during World War I, which she calls the "'alienation' of American citizens."¹² She notes a shift in naturalization from a formal process to one that emphasized "internal allegiance," whereby naturalized citizens could be denaturalized for insufficient loyalty.¹³ Citizenship became understood not just as something gained through certain formal steps, but as an "affair of the heart."¹⁴

Were the Ismails thus stripped of the rights of citizenship for supposed insufficient love of country—signified through their kinship ties to Hamid Hayat? (Hamid Hayat, who is currently appealing his case, was prosecuted because of conversations he had with an informant who was paid nearly \$225,000 by the FBI to infiltrate Lodi's only mosque, despite the fact that the informant falsely told agents that he had seen three of the world's most notorious terrorists in Lodi, including Al Qaeda second-in-command

9. Article 12(4) of the International Covenant on Civil and Political Rights states, "No one shall be arbitrarily deprived of the right to enter his own country." International Covenant on Civil and Political Rights art. 12(4), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 176. Article 13(2) of the Universal Declaration of Human Rights states, "Everyone has the right to leave any country, including his own, and to return to his country." Universal Declaration of Human Rights art. 13(2), G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc A/810 (Dec. 10, 1948).

10. For a rare judicial expression of this foundational aspect of citizenship, see *Colon v. U.S. Department of State*, 2 F. Supp. 2d 43, 46 (describing the plaintiff's desire to exercise "one of the fundamental rights of citizenship, namely the right to travel freely throughout the world and when he wants to, to return and reside in the United States").

11. See Archibold, *supra* note 1.

12. Lucy E. Salyer, *You Never Loved Me: Allegiance and the Loss of Citizenship in Wartime America 2* (2006) (unpublished manuscript, on file with the author and the Fordham Law Review).

13. *Id.* at 3.

14. *Id.*

Ayman al Zawahiri.)¹⁵ Was exile the Ismailis' punishment for insufficient allegiance? Following decisions made by the U.S. Supreme Court in the 1950s and 1960s, citizens are no longer involuntarily stripped of their formal citizenship for acts that might signify insufficient allegiance, such as voting in foreign elections or serving in foreign armies, as expatriation without the intentional renunciation of citizenship is considered cruel and unusual punishment.¹⁶

The Ismailis were not threatened with having their formal citizenship removed. But did the U.S. government's acts—acts that appear utterly without legal authority¹⁷—nonetheless so strip the Ismailis of their citizenship that it rendered them stateless? Neither Muhammad nor Jaber Ismail holds dual citizenship with Pakistan; thus, their U.S. citizenship is their only citizenship.¹⁸ The 1954 Convention Relating to the Status of Stateless Persons identifies a stateless person as someone who does not have the legal bond of nationality with any state, someone who is “not considered as a national by any State under the operation of its law.”¹⁹ This

15. See James Bamford, *Looking Beneath the Surface of a Terrorism Case*, N.Y. Times, Oct. 10, 2006, at E8. Bamford writes, “The country was never in danger from the Hayats, but may well be entering a dangerous period of unnecessary and abusive prosecutions.” *Id.* For criticism of the use of informants in terrorism prosecutions, see Demian Bulwa, *9/11: Five Years Later: Informants Tell Terrorist Tales*, S.F. Chron., Sept. 10, 2006, at E5, and *Manufactured Terrorism: FBI Paid Key Terror Informants \$56,000*, Information Liberation, July 26, 2006, <http://www.informationliberation.com/?id=13749>.

16. See *Trop v. Dulles*, 356 U.S. 86 (1958); see also *Afroyim v. Rusk*, 387 U.S. 253 (1967). Yaser Hamdi, of course, would constitute an exception to the rule, if one understands his citizenship renunciation as involuntary. The 2004 settlement agreement with federal prosecutors required Hamdi to renounce his U.S. citizenship as a condition of his release. See Settlement Agreement at 2, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), available at <http://news.findlaw.com/hdocsdocs/hamdi/91704stlagrmnt2.html>.

17. One purported source of authority was proffered by William West, former Chief of the National Security Section for the Bureau of Immigration and Customs Enforcement in Miami, to Daniel Pipes. West asserted that section 215 of the Immigration and Nationality Act, 8 U.S.C. § 1185 (2006), “allows for the ‘travel control’ of the entry and departure of citizens. U.S. citizens use their passports only within the rules, regulations, and proscriptions as issued and decided by the president.” See Daniel Pipes, *Five Years after 9/11, U.S. Makes Progress on Security*, N.Y. Sun, Sept. 5, 2006, at 5. However, section 215(a)(1) of the Act states that “it shall be unlawful . . . for any *alien* to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.” 8 U.S.C. § 1185(a)(1) (emphasis added). Section 215(b) does contain a section headlined “Citizens,” but it states only that “[e]xcept as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid United States passport.” *Id.* § 1185(b). The meaning of this section is to require the U.S. citizen to travel with a U.S. passport, unless the President otherwise allows him to do so without a passport; one cannot logically understand it to mean that the U.S. citizen would require more than the passport to depart from or enter into the country.

18. See Bulwa, *supra* note 1.

19. Convention Relating to the Status of Stateless Persons art. 1.1, *adopted* Sept. 28, 1954, 360 U.N.T.S. 117, 136.

definition generally refers to de jure stateless persons. The Ismails would be more accurately described as de facto stateless persons, because this category would include circumstances where a state refuses to acknowledge the citizenship of a national abroad for purposes of consular protection or repatriation.²⁰ The refusal to admit the Ismails into their country arguably removed not only the state protection that would come with citizenship, but also restricted their ability to exercise any of the rights of citizenship.

In Hannah Arendt's classic formulation, written with reference to the phenomenon of statelessness, the right to belong to some kind of organized community is the necessary grounding for the "right to have rights."²¹ Or, we could say, formal citizenship in a sovereign state is a precursor to enjoying the full rights of citizenship. The Ismails' case challenges that formulation, as the Ismails are possessors of formal citizenship that, nonetheless, did not sustain their right to have full rights. So what is the meaning of their formal citizenship? In the words of Usama Ismail, Jaber Ismail's brother and Muhammad Ismail's son, "What's the point of being a citizen?"²²

While citizens through birth cannot have their citizenship involuntarily stripped, naturalized citizens can have their citizenship revoked at any time, if that naturalization was illegally procured or procured by concealment of a material fact or by willful misrepresentation.²³ The Ismails, despite Jaber Ismail's birthright citizenship, and arguably like all Muslim Americans at this moment, are in a position akin to the naturalized citizen, if we agree that naturalized citizens, as citizens who have come from elsewhere, are seen as potentially suspect citizens, as lesser citizens, and as citizens tinged by a possible disloyalty. In public perception, naturalized citizens possess a weaker citizenship than do birthright citizens;²⁴ legally, they are citizens whose citizenship can be taken away in a process which deems their

20. For a criticism of the 1954 Convention's restriction of the concept of statelessness to de jure statelessness, see David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 Hum. Rts. Q. 245, 251-53 (2006) (noting that some legal scholars believe the concept of statelessness should be broadened to include de facto statelessness, to encompass those individuals who might have a legal claim to the benefits of nationality, but whose governments withhold the protection and assistance that come with citizenship).

21. Hannah Arendt, *The Origins of Totalitarianism* 296 (1973).

22. See Jeff Hood, *Two Lodi Men Stuck in Pakistan: Family Relation to Hayats Keeps Pair Exiled Until They Talk to FBI*, *The Record* (Stockton-Lodi, Cal.), Aug. 29, 2006, at A1, available at <http://www.recordnet.com/apps/pbcs.dll/article?AID=/20060829/NEWS01/608290314/1001>.

23. See Immigration and Nationality Act § 340, 8 U.S.C. § 1451 (2000).

24. See Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 BYU L. Rev. 927, 957 (2005) (describing a prevalent "presumption that birthright citizens are automatically loyal and trustworthy, and automatically committed and connected to the United States, while naturalized citizens are less—less loyal, less trustworthy, less committed, and less connected to their adopted country").

citizenship a mistake.²⁵ This perception of weaker citizenship exists despite the fact that naturalized citizens bear a contractual relationship to the state. (In fact, in a society premised upon social contract, naturalization should be considered the idealized form of citizenship, compared to what we would consider the “accidental” nature of *jus sanguinus*, or citizenship by descent, which Peter Schuck and Rogers Smith nonetheless chose to retain in their call to repeal birthright citizenship.)²⁶

When I say that all Muslim Americans are in a position akin to the naturalized citizen, I mean they possess a citizenship that is always now at risk of being undone. Their identity as Muslims—in other words, “potential terrorists”—means that they are perennially suspected of having engaged in fraud or misrepresentation, with that fraud or misrepresentation consisting of a pretense of loyalty or allegiance to the United States.

We could note here cases where the U.S. government has in fact sought to undo the formal citizenship of Muslim Americans by denaturalizing those who are accused of material or other support for terrorist organizations.²⁷ We could look to the United Kingdom, which recently amended its Nationality Act to permit the Secretary of State to revoke the citizenship of naturalized or even of birthright citizens, to be followed by deportation—with the standard for revocation having been amended shortly after last July’s bombings in London to one where the Secretary of State need only be “satisfied that deprivation is conducive to the public good.”²⁸ In July, the Guantánamo Bay detainee and Australian citizen David Hicks was stripped of his British citizenship through this provision just one day after he successfully gained British citizenship, which, because of his mother’s British citizenship, had been granted through the principal of *jus sanguinus*.²⁹

The U.S. government is also rendering it impossible for formal citizenship to be obtained. Several lawsuits have been filed challenging the

25. See *id.* (explaining that naturalized citizens can have their citizenship revoked on less compelling grounds than those facing a birthright citizen).

26. See generally Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (1985) (calling to repeal the citizenship obtained through birth in the territory of the United States of children of undocumented immigrants and children of nonimmigrants).

27. Note, for example, the cases of Abdurahman Alamoudi, Rasmi Khader Almallah, and Attiqullah Sayed Ahmadi. See Todd Bensman, *Government Moves to Strip Citizenship from Former Holy Land Foundation Board Member*, Garmo.com, Oct. 20, 2004, <http://www.garmo.com/archives/00000394.shtml> (regarding Almallah); *Border and Enforcement News*, Siskind’s Immigration Bulletin (Siskind Susser Bland, Memphis, Tenn.), Feb. 9, 2004, at 6, available at <http://www.visalaw.com/04feb2/newsletter.pdf> (regarding Ahmadi); *U.S. Muslim Official Pleads Not Guilty, Bail Denied*, Muslim American Society, Oct. 29, 2003, <http://www.masnet.org/news.asp?id=623> (regarding Alamoudi).

28. Immigration, Asylum and Nationality Act, 2006, c. 13, § 56(1) (Eng.).

29. See Jeannie Shawl, *Gitmo Detainee Hicks Stripped of UK Citizenship One Day After Request Granted*, Jurist, Aug. 19, 2006, <http://jurist.law.pitt.edu/paperchase/2006/08/gitmo-detainee-hicks-stripped-of-uk.php>.

government's delays in approving the naturalization of Muslim applicants, delays that have lasted for years in some cases.³⁰

The citizenship of Muslim Americans is undone in another sense. Muslim Americans' experience of citizenship has suffered as collateral damage from what is called the "war on terror." The government has imposed a massive network of surveillance upon Muslim communities. Every aspect of Muslim immigrant life is being watched in locations such as Detroit, "from IRS scrutiny of international Muslim charities and businesses, to FBI surveillance of local meeting places."³¹ This has effected, as Moustafa Bayoumi recently suggested in *The Nation*, an isolation of these communities under the rubric of suspicion.³² This suspicion is, of course, shared by the public. In a July 2006 poll conducted by USA Today/Gallop, thirty-nine percent of Americans admitted to being prejudiced against Muslims.³³ The same percentage of Americans polled think that Muslims, including U.S. citizens, should carry special IDs.³⁴ More than twenty percent do not want Muslims for neighbors.³⁵ It goes without saying that Muslim Americans do not enjoy citizenship as a matter of identity. Muslim Americans are not perceived as fellow citizens in the sense of having affective ties of kinship; rather, the collective identity of American citizenship coalesces against them.³⁶

Early in the "war on terror," legal scholar David Cole argued that the government's response to September 11 selectively sacrificed the rights of aliens, but not of citizens, who could feel secure through the targeting of

30. See *Aziz v. Gonzales*, No. 06-4791 (C.D. Cal. filed Aug. 1, 2006); *Yakubova v. Chertoff*, No. 06-3203 (E.D.N.Y. filed June 28, 2006); *Alsamman v. Gonzales*, No. 06-2518 (N.D. Ill. filed May 4, 2006). The proposed class in *Alsamman* consists of "[a]ll Muslim males, or those males appearing Muslim on the basis of their ethnic heritage due to their national origin, who are or will be lawful permanent residents applying for naturalization to become U.S. citizens, and whose swearing-in ceremony has been delayed more than 120 days since the applicant passed his naturalization interview." *Alsamman*, No. 06-2518, at 3-4. For more on these types of delays, see Diana Day, *Los Angeles Civil Rights Groups Sue the Government Over Citizenship Delays*, *Carnegie-Knight Initiative on the Future of Journalism Education*, Aug. 2, 2006, http://newsinitiative.org/story/2006/08/02/los_angeles_civil_rights_groups. Anecdotaly, immigrants' advocates have noted that naturalization applicants from predominantly Muslim countries, China, Russia, and other former Soviet countries, appear to be disproportionately affected by delays. Email from Cecillia Wang, Senior Staff Counsel, ACLU Immigrants' Rights Project, to Leti Volpp, Professor of Law, Boalt Hall School of Law, U.C. Berkeley (Feb. 5, 2007, 11:41 PST) (on file with author and the Fordham Law Review).

31. Tamara Audi, *Terror War Hits Home: Secret Sweep: Detroiters Caught in Widening Investigation*, *Detroit Free Press*, Nov. 12, 2002, at 1A.

32. See Moustafa Bayoumi, *Arab America's September 11*, *The Nation*, Sept. 25, 2006, at 22, 22, available at <http://www.thenation.com/doc/20060925/bayoumi>.

33. *Id.* at 26.

34. *Id.*

35. *Id.*

36. See Leti Volpp, *The Citizen and the Terrorist*, 49 *UCLA L. Rev.* 1575, 1594 (2002).

noncitizens.³⁷ Noncitizens were targeted in the form of detention and removal immediately after September 11,³⁸ the so-called “voluntary” interviews,³⁹ the Absconder Apprehension Initiative,⁴⁰ and the Special Registration program.⁴¹ But, five years out, we must acknowledge that, even while the “war on terror” continues to rely upon a double standard between foreign nationals and citizens, the “war on terror” also selectively impairs the rights of certain citizens.⁴²

The hostility in the air that Muslims are breathing is exemplified by the case of Raed Jarrar, who was barred from boarding a Jet Blue flight from New York to California because he wore a T-shirt with the words “we will not be silent” in Arabic and English.⁴³ He was told by one of the men intercepting him that going to an airport with a T-shirt in Arabic script is “like wearing a t-shirt that reads ‘I am a robber’ and going to a bank.”⁴⁴ After Jarrar refused to remove his T-shirt, he was told by a Jet Blue employee that she would buy him another to cover his own.⁴⁵ She asked, “Should I get you an ‘I heart New York T-shirt?’”⁴⁶ One of the men who barred Jarrar from boarding responded, “No, we shouldn’t ask him to go from one extreme to another.”⁴⁷ Jarrar asked why this man assumed that he

37. See generally David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (2003).

38. See generally *Human Rights: U.S. Detention of Aliens in Aftermath of September 11 Attacks*, in *Contemporary Practice of the United States Relating to International Law*, 96 Am. J. Int’l L. 461, 470 (2002).

39. See generally Jodi Wilgoren, *A Nation Challenged: The Interviews: Questioning with a Powder-Puff Edge*, N.Y. Times, Dec. 13, 2001, at B7.

40. See generally Jennifer Hopkins, *Absconder Apprehension Initiative*, U.S. Visa News, Oct. 22, 2003, <http://www.usvisanews.com/articles/memo2163.shtml>.

41. See generally Maia Jachimowicz & Ramah McKay, *‘Special Registration’ Program*, Migration Information Source, Apr. 1, 2003, <http://www.migrationinformation.org/USFocus/display.cfm?ID=116>.

42. At the Symposium, Rogers Smith suggested that the new Military Commissions Act passed by Congress, which allows the President to declare an American citizen to be an enemy combatant if that citizen “provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism” could be seen as signifying a shift in the war on terror to target citizens. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2630 (2006) (to be codified at 10 U.S.C. § 950(v)(b)(25)(A)). It is important to note here that the citizen/noncitizen distinction continues in the Military Commissions Act, as it reserves military commissions for noncitizens only. Citizens, even enemy combatants charged with war crimes, are tried either by court martial or in federal court under the War Crimes Act, both of which offer procedural and substantive rights absent from the military commission system. See Muneer I. Ahmad, *No Right to Have Rights: Reflections on Litigation at Guantánamo Bay*, 2007 U. Chi. Legal F. (forthcoming 2007) (on file with the author and the Fordham Law Review).

43. See Posting by Raed Jarrar to In the Middle, *Back From the Mideast*, <http://raedinthemiddle.blogspot.com> (Aug. 10, 2006, 19:09 EST).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

hated New York if he had Arabic script on his T-shirt, but got no answer.⁴⁸ His parting words on his blog entry about the incident were, "It sucks to be an Arab/Muslim living in the U.S. these days."⁴⁹

The Ismails were cleared to return home in September 2006, and they finally returned in October 2006.⁵⁰ In the Kafkaesque world of Homeland Security, there was only one official utterance upon their being cleared: "[t]here's been a change," spoken by an official on condition of anonymity.⁵¹ While the Ismails' limbo has come to an end, as they have now been allowed to return to their country,⁵² there has indeed been a change—a change in the citizenship of all Muslim Americans who, at this moment, and into the foreseeable future, can only experience a citizenship at risk of being undone.

48. *Id.*

49. *Id.*

50. See Jeff Hood, *Hayats' Relatives Return Home After Five Months: Men Stuck Abroad When Names Turn Up on Fed's No-Fly List*, *The Record* (Stockton-Lodi, Cal.) (second ed.), Oct. 3, 2006, at A1, available at http://www.recordnet.com/apps/pbcs.dll/article?AID=/20061003/NEWS01/610030339/-1/A_NEWS13.

51. See Demian Bulwa, *Lodi: Men OK'd to Return to U.S. From Pakistan*, *S.F. Chron.*, Sept. 13, 2006, at B5.

52. See Randal C. Archibold, *Wait Ends for Father and Son Exiled by F.B.I. Terror Inquiry*, *N.Y. Times*, Oct. 2, 2006, at A10.